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In The
SUPREME COURT OF THE UNITED STATES

ALASKA AIRLINES, INC ,
Petitioners

v.

AZZA EID, *et al.*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND INTERNATIONAL FEDERATION OF AIR LINE PILOTS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Air Line Pilots Association, International, ("ALPA"), founded in 1931, is the largest airline pilot union in the world and represents nearly 53,000 pilots at 38 airlines in the United States and Canada. ALPA is the exclusive representative of pilots employed by Alaska Airlines. Over its 80 year history, ALPA has been at the forefront of nearly every significant safety improvement in the airline industry. ALPA enjoys an international reputation for fact-based evaluation of airline safety and security issues.

The International Federation of Air Line Pilots Association ("IFALPA") is a non-political, non-profit organization that speaks for over 100,000 airline pilots represented by 101 member Associations throughout the world. IFALPA is a permanent observer on the International Civil Aviation Organization ("ICAO"). As a permanent observer, IFALPA plays a major role in the development of world-wide aviation standards and recommended practices to enhance flight safety. IFALPA's headquarters are located in Chertsey, U.K.[1]

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[1] *Amici* file this brief with the written consent of all parties which has been lodged with the Clerk of this court Pursuant to Rule 37 2 counsel of record for all parties received notice at least ten days prior to the due date of *Amici*'s intention to file this brief No counsel for a party authored this brief in whole or in part and only those entities listed on the cover have contributed financially to its preparation

Because of the precedential significance of the issues in this case relating to the authority and responsibility of the Pilot-in-Command ("Captain") of a commercial aircraft, which is directly related to flight safety, *Amici Curiae* ALPA and IFALPA, submit this brief in support of Petitioner Alaska Airlines, Inc.'s Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

It is established law that the Captain is responsible for the safety and security of the aircraft he is operating. To fulfill this responsibility, the Captain has wide discretion to make judgments for the safety of the aircraft.

Since September 11, 2001 ("9/11"), as an anti-terrorist measure, pilots are required to remain in a locked cockpit. If there is a disturbance in the cabin of the aircraft, the Captain must rely on the reports of his cabin crew. This is a sensible practice because they are highly trained safety professionals. It is impracticable, if not impossible, for the Captain to independently verify such reports considering that he must focus his attention on flying an aircraft traveling miles above the earth at speeds exceeding 500 miles per hour and is prohibited from leaving the cockpit. Until the Ninth Circuit's decision, the law was well established that deference was given to a Captain's decision when relying upon the reports of his cabin crew. The Ninth Circuit rejected the deference standard and imposed a reasonableness standard requiring independent investigation by the Captain to verify his cabin crew's reports. This

decision is contrary to the decisions of other courts that have addressed this issue both in the United States and internationally. The Ninth Circuit decision incorrectly interprets the Tokyo Convention and imposes a standard that is virtually impossible to apply in the aviation context. Requiring Captains to investigate disturbances and be subject to hindsight review will cause hesitation and will delay decisions by the Pilot-in-Command, consequently degrading flight safety.

If the Ninth Circuit's decision stands, it will be impossible to maintain a standard procedure for Captains to follow in security matters. Different jurisdictions would require the application of varying legal standards. Therefore, it is likely that airlines would adopt a procedure to comply with the lowest common denominator diminishing the level of safety.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION ERODES CAPTAIN'S AUTHORITY AND FLIGHT SAFETY

It is long-standing law that the Captain of an aircraft is "directly responsible and is the final authority as to the operation of the aircraft." 14. C.F.R. § 91.3(a) (2006) (ICAO Annex 6, para. 4.5.1) *See Moorhead v. Mitsubishi Aircraft Int'l, Inc.*, 828 F.2d 278 (5th Cir. 1987) (pilots are the final authority for the operation of their planes); *United States v. Miller*, 303 F.2d 703, 710 (9th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963) (pilot has ultimate

responsibility for operation of aircraft); *Sawyer v. United States*, 297 F. Supp. 324 (E.D.N.Y. 1969), *aff'd*, 436 F.2d 640 (2d Cir. 1971) (the responsibility for the safety of the airplane and its passengers rests with the Captain).

While the first responsibility of the Captain is to fly the aircraft, the new security regulations imposed since 9/11 have given the Captain greater responsibility for security matters. Because of the continuing reports of terrorist threats to aircraft, pilots have a heightened responsibility regarding security matters and must be in a position to react immediately to any real or perceived security threats.

To fulfill his responsibilities, the Captain must be vested with the authority to make split second decisions to preserve safety and security. A Captain is given broad discretion to carry out his critical responsibilities. *See Al-Watan v. American Airlines, Inc.*, 658 F. Supp. 2d 816, 823 (E.D. Mich. 2009) (Air carrier has broad discretion to remove domestic passenger and the Pilot-in-Command stands in the role of the air carrier as the actual decision maker); *Zervigon v. Piedmont Aviation, Inc.*, 558 F. Supp. 1305, 1306 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1433 (2d Cir. 1983) (fact that safety and well being of many lives are dependent upon his judgment necessarily means that the Captain is vested with wide discretion); *Enoch Row*, 2 N.T.S.B. 199, 201 (1973) (Captain has a considerable degree of discretion in exercising his responsibilities as Pilot-in-Command).

Given the Captain's need to focus on flying the airplane and his inability to leave the cockpit, he must rely on reports from his cabin crew regarding any disturbance in the cabin. Courts have routinely affirmed the Captain's reliance on reports from his crew without the need to verify the reports. *Al-Watan v. American Airlines, Inc.*, *supra* at 828 ("The flight attendants are his (Captain's) eyes and ears in the passenger area of the airplane, while he is closeted in the cockpit."). *Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 340 (E.D.N.Y. 2002) (Captain is entitled without further inquiry to rely upon a flight attendant's representations that a conflict with a passenger might distract the flight attendant from performing his or her safety-related duties); *see also Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 397-98 (S.D.N.Y. 2004) (quoting *Christel* with approval and finding Captain's decision to remove the passenger without knowledge of the specifics of his behavior not arbitrary or capricious as a matter of law); *Al-Qudhai'een v. America West Airlines, Inc.*, 267 F. Supp. 2d 841, 847-48 (S.D. Ohio 2003) (finding Captain was not required to conduct any investigation of flight attendant's representations even if they were false or exaggerated and holding decision to remove passengers from the aircraft was not arbitrary or capricious as a matter of law); *Zervigon v. Piedmont Aviation, Inc.*, 558 F. Supp. 1305, 1307 (finding Captain's reliance on multiple hearsay statements in removing passengers was reasonable; requiring the Captain to question each member of the group before ordering his or her removal is unrealistic).

After the 9/11 tragedy, the Federal Aviation Administration ("FAA") required that all passenger aircraft have reinforced lockable cockpit doors, which must be closed and locked at all times when the aircraft is being operated. 14 C.F.R.§ 212.313; 25.795; 14 C.F.R. § 121.587. Moreover, during the flight the pilots must remain in their seats with seat belts fastened. 14 C.F.R. § 121.543. Since the enactment of these additional regulations, the Captain has no choice but to rely upon the reports of his cabin crew.

Not only is the Captain compelled to rely on his cabin crew's representations, such reliance is fundamentally sound. Each member of the cabin crew is trained and certified pursuant to FAA regulations, 14 C.F.R. §§ 121.415, 121.417. The cabin crew also receives flight security training as required by the Transportation Security Administration, 49 C.F.R. § 1544.233. Thus, when, as here, a highly trained flight attendant reports she has "lost control" of the first class cabin, the Captain must treat that report seriously. Based on the cabin and flight crew's security training, that report indicates to the Captain that the flight attendant is now unable to focus on safety-related tasks, and that this disturbance in the first class cabin could detract attention away from dangerous passenger activities elsewhere in the cabin (including beyond the range of the cockpit peephole).

Given the time sensitive nature of preserving safety and security during flight operations, it is

expected that the Captain will act conservatively and promptly. Any delay in making and implementing a decision could lead to disastrous results for the passengers and crew. This means that, in the event of a disturbance, the Captain must make a swift decision, often with imperfect information and little or no time or ability to investigate. That is why decisions by the Captain have always been accorded substantial deference by both foreign and United States courts, in accordance with the views of the United States government regarding the Tokyo Convention. Moreover, this precedent permits the Captain to rely on the reports of his cabin crew without further investigation. *See* Pet'r's Br. and citations therein, pp. 20-32.

The Ninth Circuit rejected this established authority and held that decisions of the Captain are not entitled to deference under the Tokyo Convention but are subject to review. The Ninth Circuit's standard requires independent investigation by the Captain to verify his cabin crew's reports before making a decision. *See* Pet'r's App. A, pp. 18a, 19a, 25a.

Changing the deferential arbitrary and capricious legal standard to a reasonableness standard fails to consider the critical time-sensitive circumstances under which Captain's decisions are made and radically changes the landscape for pilots.

Under the Ninth Circuit's new reasonableness standard, airline Captains would be obligated to subordinate flying the aircraft in order to conduct an

independent investigation, consider the results of the investigation, and only then make a decision. This process requires time, and, in critical circumstances, Captains simply do not have the luxury of time. Even then it would not be a decision based in the reason of FAA regulations and airline safety experience, but rather based on an anticipated juror's perception of what the artificial construction of what a "reasonable man" would do. Furthermore, should the Captain conduct such an investigation, his decisions could nevertheless be subject to microscopic scrutiny in litigation some years later. As a result, airline Captains will be reluctant to make prompt decisions knowing that they will subject their employers to costly litigation and subject themselves to being second-guessed by laymen jurors. Pilots, already cautious about conducting a costly, inconvenient flight diversion or disembarking fare-paying passengers, could begin to err on the side of avoiding passenger lawsuits rather than to err, as they should, on the side of caution. This additional weight against taking quick affirmative actions to preserve safety in the face of potential, but not always crystal-clear, danger is to the great detriment of aviation safety. A Captain might not take decisive action when he should, which could result in serious consequences for the passengers and crew.

In addition to causing a potentially dangerous pause in the Captain's decision-making, the Ninth Circuit's requirement for some investigation by the Captain after landing misunderstands his traditional role. Once a Captain makes a decision to

land the aircraft because of passenger misconduct, his obligation under the Tokyo Convention is to turn the offending passengers over to competent law enforcement authorities. These authorities are trained to conduct investigations into the matter; the Captain is not. Once the Captain has delivered the offending passengers and provided the authorities with the information and evidence in his possession, he has fulfilled his obligations. *See* Tokyo Convention, Articles 8 and 9; Pet'r's App., pp 102a, 103a. The Captain is then in a position to make a decision to continue the flight without the offending passengers. If the Captain makes an unscheduled landing because of the conduct of some passengers, it is a common sense decision to continue the flight without those passengers. *See, e.g., Zervigon*, 558 F. Supp. at 1307-08 (disembarkation of eight passengers reasonable where they were traveling as a group). The Ninth Circuit's decision to impose new law enforcement investigation duties upon the Captain after disembarking the passengers will require airlines to create training protocols in law enforcement procedures, which are not contemplated by the Tokyo Convention.

II. LACK OF A UNIFORM STANDARD FOR CAPTAIN'S AUTHORITY IS DETRIMENTAL TO FLIGHT SAFETY

Airline safety and security require that pilots be trained to operate aircraft in a standard manner. Checklists, instrument flow patterns, conversations with air traffic control and other procedures must be performed by pilots in the same way, regardless of

the point of departure or destination. Indeed, pilots are not trained to make decisions based on whether the flight (or a particular leg of a flight) is international or domestic, or to scrutinize the passenger list to determine which passengers are connecting from international or domestic flights. To a pilot, it is important that there be uniform standards for flight safety and security for all flights and for all passengers. ALPA and IFALPA on behalf of their members are greatly concerned by the confusion that this decision engenders in pilots as to whether their decisions regarding flight safety and security will be accorded deference. The Ninth Circuit would make the Captain's decision, at least for international passengers, subject to "second guessing" by courts and juries. Other jurisdictions presumably would continue to give the Captain's decision deference and apply the arbitrary and capricious standard. Pilots need a consistent and uniform standard for domestic and international flights regarding their obligations to investigate passenger disturbances and their ability to rely on the flight crew's representations regarding such disturbances.

The Ninth Circuit's decision changes the deference due to a Captain's decision and his ability to fully rely on the cabin crew. Both airlines and pilots are now in a quandary to distinguish flight safety procedures in the domestic and the international context. Such procedural distinctions make for difficult, if not impossible, line-drawing for the purposes of training and flight operations. Pilots routinely fly throughout the country on a given day

and fly interchangeably in domestic and international service. Captains advised of the Ninth Circuit's decision will be confused just where and to whom this "reasonableness" standard applies. Most likely, the need for consistent standards for a Captain's actions will cause airlines to adopt new training and procedures based on the "least common denominator" standards - that is, requiring Captains in some circumstances to multi-task flying the airplane and investigating the crew and passengers, causing the Pilot to delay taking appropriate action. ALPA and IFALPA respectfully submit that the Ninth Circuit's reasonableness standard requiring an independent investigation, which would allow for second-guessing by a court or jury, undermines the exercise of the Captain's authority to the detriment of the traveling public.

CONCLUSION

The terrorist attacks on the New York World Trade Center and the Pentagon on 9/11 are forever etched in the consciousness of not only every pilot but everyone around the world. The passengers and crew of an aircraft entrust the Captain with their lives to transport them safely to their destination. To fulfill this trust, the Captain must have the ability to make split second decisions for the safety of the flight. When he receives a report from his cabin crew that they have lost control of the cabin, not having the luxury of time to investigate, he must accept that report as communicating a potential threat to the safety of the aircraft and take immediate action to land. Therefore, *Amici Curiae*

respectfully request that this Court grant the Petition for Writ of Certiorari in this action.

Respectfully submitted,

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